

IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON
NO. 34154

BUILDERS' SERVICE AND SUPPLY COMPANY,
Plaintiff Below, Appellee,

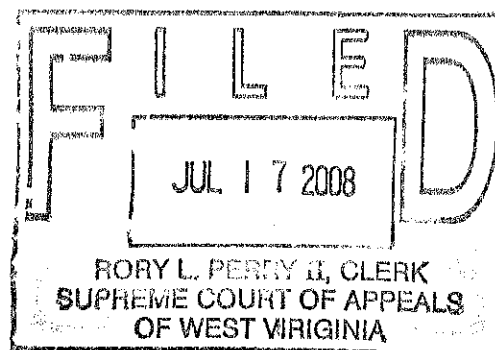
vs.

TAYLOR COUNTY CIRCUIT COURT
CASE NO. 03-C-63

CHRISTAL M. DEMPSEY, A.K.A
CHRISTAL M. SMITH, AND
CLARK SINCLAIR, SHERIFF
OF TAYLOR COUNTY, WEST VIRGINIA,
Defendants and Third-Party
Plaintiff Below,

vs.

EDWARD CHARLTON, DBA
CHARLTON CONSTRUCTION,
Third-Party Defendants Below,
Appellees



Christal M. Dempsey Smith, Appellant

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APPELLANT'S BRIEF

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Counselor for Appellant:



A handwritten signature in cursive script, appearing to read "RaeLynn Regula".

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
<hr/>	
I. PROCEEDINGS AND OPINIONS BELOW	1
II. STATEMENT OF THE CASE	4
III. ASSIGNMENT OF ERROR	7
IV. DISCUSSION OF LAW	7
V. CONCLUSION	17
VI. PRAYER FOR RELIEF	18

TABLE OF AUTHORITIES

PAGE

WEST VIRGINIA SUPREME COURT OF APPEALS CASES:

<u>AT&T Communications of West Virginia, Inc. v. Public Serv. Comm'n of West Virginia,</u> 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992)	16
<u>Brent v. Board of Trustees of Davis & Elkins Collge,</u> 173 W.Va. 36, 311 S.E.2d 153 (1983)	8
<u>Covington v. Smith,</u> 213 W.Va. 309, 582 S.E.2d 756 (2003)	13, 14, 16
<u>Dimon v. Mansy,</u> 198 W.Va. 40, S.E.2d 339 (1996)	12, 13, 14, 15
<u>Howerton v. Tri-State Salvage, Inc.,</u> 210 W.Va. 233, 236, 557 S.E.2d 287, 290 (2001)	12
<u>McDaniel v. Ramano,</u> 155 W.Va. 875, 190 S.E.2d 8 (1970)	12
<u>Nibert v. Carroll Trucking, Co.,</u> 139 W.Va. 583, 82 S.E.2d 445 (1954)	8
<u>Toler v. Shelton,</u> 157 W.Va. 778, 204 S.E.2d 85 (1974)	17, 18
<u>Winona Nat'l Bank v. Fridley,</u> 122 W.Va. 479, 10 S.E.2d 907 (1940)	16

WEST VIRGINIA STATUTES:

W. Va. Code § 56-8-12	8
-----------------------	---

RULES:

W.Va. R. Civ. P. 41 (b)

3, 6, 7, 8, 9,
10, 13

W.Va. R. Civ. P. 60

3, 7, 11, 17

W. Va. Trial Ct. R. 2.19

8, 9

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Christal M. Dempsey Smith, Appellant

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APPELLANT'S BRIEF

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I.

PROCEEDINGS AND OPINIONS BELOW

This is an appeal from a final Order of the Circuit Court of Taylor County denying the Appellant's Motion to Reconsider Order Denying Motion to Reinstate, entered by Judge Alan D. Moats on July 11, 2007. On August 5, 2003, Builders' Service and Supply Company, one of the Appellees herein, filed a breach of contract action

against the Appellant, Christal M. Dempsey, a.k.a. Christal M. Smith (hereinafter sometimes referred to as "Ms. Smith"), in the Circuit Court of Taylor County, West Virginia, Civil Action No. 03-C-63, before Judge Alan D. Moats, to enforce a mechanics lien which alleged that Ms. Smith had acquired building materials and supplies from the Appellee's company while not paying the outstanding balance on her account. (See Complaint). On or about the same date, Builders' Service and Supply Company filed a Notice of Lis Pendens on Ms. Smith's property. (See Notice of Lis Pendens).

On or about September 16, 2003, Ms. Smith, by and through her attorney, Charles E. Anderson, filed an Answer which included a Counterclaim against Builders' Service and Supply Company, as well as a Third-Party Complaint against Edward Charlton dba Charlton Construction (hereinafter referred to as "Mr. Charlton"). (See Answer of Christal M. Dempsey a.k.a. Christal M. Smith). Subsequent to the filing of Ms. Smith's answer, additional pleadings were filed and the discovery process was initiated, which included written discovery requests and oral depositions being taken.

On or about October 6, 2004, Charles E. Anderson, counsel for Ms. Smith filed a Motion to Withdraw as Counsel, citing as grounds a strong possibility that one of the witnesses for the Plaintiff would be a former client and expressed doubts that he may not be able to represent Ms. Smith without her being prejudiced by his prior representation. (See Motion to Withdraw as Counsel). Judge Moats, by Order entered November 14, 2004, denied Mr. Anderson's Motion to Withdraw as Counsel. (See Order Denying Counsels Motion to Withdraw). Though Mr. Anderson felt that there

was a potential conflict with his representation of Ms. Smith, Ms. Smith believed there to be no conflict, and directed Mr. Anderson to continue to representation her. Ms. Smith was never notified by Mr. Anderson that he would not continue to represent her after his motion to withdraw as counsel had been denied. Eventually, Ms. Smith's relationship with Mr. Anderson terminated and any activity in the matter ceased.

By Dismissal Order entered on February 17, 2006, Judge Moats dismissed the above-styled civil action pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure, in that there had been no order or proceeding for more than one year and no motions were filed alleging good cause why the action should not be dismissed. (*See* Dismissal Order). Ms. Smith was not notified of the trial court's intent to dismiss her case by her attorney, Mr. Anderson; it was only after the trial court had entered its Order that Mr. Anderson informed Ms. Smith that her case had been dismissed.

On or about February 16, 2007, Mr. William C. Brewer, of Brewer & Giggenbach, PLLC, filed a Notice of Appearance in the above-styled case, along with a Motion to Reinstate, pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure, which established good cause for the period of inactivity. (*See* Motion to Reinstate). By Order entered March 21, 2007, the trial court denied Ms. Smith's Motion to Reinstate without a hearing on the motion. (*See* Order Denying Motion to Reinstate). On or about June 13, 2007, Ms. Smith, by and through her attorney, filed a Motion to Reconsider Order Denying Motion to Reinstate, pursuant to Rule 60 of the West Virginia Rules of Civil Procedure, again setting forth good cause for the period of inactivity. (*See* Motion to

Reconsider Order Denying Motion to Reinstate). By Order entered on July 11, 2007, the trial court entered an order denying the Motion to Reconsider Order Denying Motion to Reinstate, without having heard the matter, which gives rise to this appeal. (See Order Denying Motion). The Petition in this matter was timely filed pursuant to Rule 3 of the West Virginia Rules of Appellate Procedure.

II.

STATEMENT OF THE CASE

Ms. Smith entered into an oral contract with Mr. Charlton on or about May 15, 2002, to perform certain remodeling and construction work at her home located at RR 1, Box 334, Thornton, Fetterman District, Taylor County, West Virginia. Mr. Charlton, who was not an agent or representative of Ms. Smith, opened an unauthorized account at Builders' Service and Supply Company, in Grafton, Taylor County, West Virginia, under Ms. Smith's name, and began to charge construction materials and other items, including personal items, which were not used in Ms. Smith's construction project, to the account. The monies which Ms. Smith paid to Mr. Charlton for the construction project were fraudulently converted to his own use and not used to purchase the necessary construction supplies. Further, Mr. Charlton never finished the construction project on Ms. Smith's property and the work which was completed was done in an unworkmanlike and unprofessional manner.

Builders' Service and Supply Company allowed Mr. Charlton to open an account under Ms. Smith's name without seeking the proper authorization from Ms. Smith. As

a result of the unauthorized account being opened in Ms. Smith's name by Mr. Charlton, Builders' Service and Supply Company filed two mechanics liens on Ms. Smith's property, which Builders' Service and Supply Company sought to enforce by initiating a cause of action against Ms. Smith in the Circuit Court of Taylor County, Case No. 03-C-63. Builders' Service and Supply Company alleged that Ms. Smith owed approximately \$3,409.81 as an outstanding balance on her account. (*See Complaint*). In Ms. Smith's Answer to the Complaint filed on September 16, 2003, she set forth a Counterclaim against Builders' Service and Supply Company, as well as a Third-Party claim against Mr. Charlton, dba Charlton Construction. (*See Answer of Christal M. Dempsey a.k.a. Christal M. Smith*). In her Counterclaim Ms. Smith asserted that Builders' Service and Supply Company allowed Mr. Charlton to charge materials on an account at its store without her authorization or consent, and that Mr. Charlton was not an agent of Ms. Smith's. Further, Ms. Smith asserted that Builders' Service and Supply Company allowed Mr. Charlton to charge materials which were not used for Ms. Smith's construction project to the unauthorized account in her name.

Additionally, Builders' Services and Supply Company fraudulently induced Ms. Smith to pay \$5,992.14 as payment toward the balance of the unauthorized account and refused to supply her with copies of the invoices for the items Mr. Charlton charged on her unauthorized account. Ms. Smith informed Builders' Service and Supply Company that she would not be responsible for any charges made by Mr. Charlton, but Builders' Service and Supply Company colluded with Mr. Charlton and allowed him to continue

to charge materials to the unauthorized account after Ms. Smith specifically refused to be held responsible for said account charges.

On or about October 6, 2004, Charles E. Anderson, counsel for Ms. Smith filed a Motion to Withdraw as Counsel, citing as grounds a strong possibility that one of the witnesses for the Plaintiff would be a former client and expressed doubts that he may not be able to represent Ms. Smith without her being prejudiced by his prior representation. (*See* Motion to Withdraw as Counsel). Judge Moats, by Order entered on November 14, 2004, denied Mr. Anderson's Motion to Withdraw as Counsel. (*See* Order Denying Counsels Motion to Withdraw). Though Mr. Anderson felt that there was a potential conflict with his representation of Ms. Smith, Ms. Smith believed there to be no conflict, and directed Mr. Anderson to continue her representation. Ms. Smith believed that Mr. Anderson was continuing to represent her in this matter after the trial court denied his Motion to Withdraw.

By Dismissal Order entered on February 17, 2006, Judge Moats dismissed the above-styled civil action pursuant to West Virginia Rule of Civil Procedure 41(b), in that there had been no order or proceeding for more than one year. Ms. Smith was not notified of the trial court's intent to dismiss her case by her attorney; it was only after the trial court had entered its Order that Ms. Smith's attorney informed her that the case had been dismissed.

On or about February 16, 2007, Mr. William C. Brewer, of Brewer & Giggenbach, PLLC, filed a Notice of Appearance in the above-styled case, along with a Motion to

Reinstate, pursuant to West Virginia Rule of Civil Procedure 41(b). By Order entered March 21, 2007, the trial court denied Ms. Smith's Motion to Reinstate without a hearing. On or about June 13, 2007, Ms. Smith, by and through her attorney, filed a Motion to Reconsider Order Denying Motion to Reinstate, pursuant to Rule 60 of the West Virginia Rules of Civil Procedure. By Order entered on July 11, 2007, the trial court entered an Order denying the motion to reconsider without a hearing on the motion.

III.

ASSIGNMENT OF ERROR

The Appellant assigns as error the following grounds:

1. The Circuit Court of Taylor County erred when it denied the Appellant's Motion to Reconsider Order Denying Motion to Reinstate as sufficient grounds existed for the trial court to vacate its Order Denying Motion to Reinstate, in that good cause had been established for the period of inactivity.

IV.

DISCUSSION OF LAW

1. The Circuit Court of Taylor County abused its discretion by refusing to disturb its Dismissal Order and Order Denying Motion to Reinstate when sufficient grounds of good cause existed during the period of inactivity to vacate the its prior ruling.

On February 17, 2006, Judge Alan D. Moats of the Circuit Court of Taylor County entered a Dismissal Order, pursuant to Rule 41(b) of the West Virginia Rules of

Civil Procedure, dismissing the Appellant's cause of action as "there had been no Order or proceeding for more than one (1) year." (*See Dismissal Order*). West Virginia Code § 56-8-12 states:

Any court may, on motion, reinstate on the trial docket of the court any case dismissed, and set aside any nonsuit that may be entered by reason of the nonappearance of the plaintiff, within three terms after the order of dismissal shall have been made, or order of nonsuit entered; but any such order of reinstatement shall not be entered until the accrued costs in such case shall have been paid.

This Court held in Brent v. Board of Trustees of Davis & Elkins College, that a case may be reinstated only upon the satisfaction of two separate requirements:

under rule 41(b), in order to reinstate a cause of action which has been dismissed for failure to prosecute, the plaintiff must move for reinstatement within three terms of entry of the dismissal order and make a showing of good cause which adequately excuses his neglect in prosecution of the case.

Brent v. Board of Trustees of Davis & Elkins College, 173 W.Va. 36, 39, 311 S.E.2d 153, 157 (1983), *overruled on other grounds*. "In the absence of a showing of good cause in support of a motion to set aside a nonsuit and reinstate the case the ruling of a trial court denying such motion will not be disturbed by an appellate court." Syl. Pt. 2, Nibert v. Carroll Trucking, Co., 139 W.Va. 583, 82 S.E.2d 445 (1954).

The Appellant has met the first requirement under W.Va.R.Civ.P. 41(b), in that her Motion to Reinstate was filed within three (3) terms of the entry of the dismissal order. The Dismissal Order was entered February 17, 2006, in the January term of court for the Circuit Court of Taylor County. West Virginia Trial Court Rules, Rule 2.19. Prior

to the filing of the Appellant's Motion to Reinstate on February 16, 2007, only two terms of court had passed, those being the April and September terms, per West Virginia Trial Court Rule 2.19.

Further, the Appellant has also fulfilled the second requirement under W.Va.R.Civ.P. 41(b), as she has made a showing of good cause which adequately excuses her neglect in prosecution of this case. Prior to the entry of the Dismissal Order, the last activity in the court file was Mr. Anderson's Motion to Withdraw as Counsel, filed on October 6, 2004, and the subsequent Order entered by the Court on November 14, 2004, denying Mr. Anderson's motion. It appears that Ms. Smith's attorney at the time, Mr. Anderson, filed a Motion to Withdraw as Counsel, providing that he had doubts that he would be able to represent Ms. Smith without her being prejudiced by prior representations. The prior representation Mr. Anderson alluded to involved a strong possibility that one of the witness for the Plaintiff, Builders' Services and Supply Company, would be a former client of Mr. Anderson's. (See Motion to Withdraw as Counsel). After a hearing held on November 4, 2004, and by Order entered November 15, 2004, the trial court denied Mr. Anderson's motion to withdraw. In that Order the court indicated to counsel that if Ms. Smith desired "to have new counsel, she should hire new counsel and that counsel should file a Notice of Appearance." (See Order Denying Counsels Motion to Withdraw). Ms. Smith informed Mr. Anderson that she still wanted him to continue to represent her interest in this matter and as a result there was no need for Ms. Smith to seek or employ new counsel. Ms. Smith was under the

belief that Mr. Anderson was continuing to represent her throughout the period of inactivity.

Subsequent to the court's Order Denying Counsels Motion to Withdraw, the attorney-client relationship between Ms. Smith and Mr. Anderson deteriorated and eventually ceased, though Ms. Smith did not consent to the termination of the relationship. Ms. Smith was never informed by her counsel that the trial court had sent out a Notice of Intended Dismissal of Action under Rule 41(b) or that the case would be dismissed if a motion was not filed alleging good cause why the action should not be dismissed. It was only after the trial court entered its Dismissal Order on February 17, 2006, that Mr. Anderson informed Ms. Smith that the case had been dismissed.

As a result of the dismissal, Ms. Smith sought new counsel in order to represent her interests in this matter. The undersigned counsel was retained by Ms. Smith after the trial court entered its February 17, 2006, Order dismissing the case for a lack of activity. The undersigned counsel had been in the process of investigating Ms. Smith's case and reviewing her file in order to posture the claim so that it may be placed on the Court's active docket. As a result, a Motion to Reinstate was filed on February 16, 2007, which set forth the difficulties the Appellant had with her former counsel. The trial court entered its Order denying the Motion on March 21, 2007, without having a hearing on the matter, even though the undersigned's office had been in contact with the court's office to inquire as to the setting of a hearing. (*See* Motion to Reinstate and Order Denying Motion to Reinstate). In its Order, the trial court noted that Ms. Smith

filed an unrelated action in that court on February 23, 2005, Case Number 05-C-17, which was dismissed by Order entered December 7, 2006, as a result of inactivity for a period of more than one year. The trial court found that there had been no showing of good cause to excuse Ms. Smith's neglect in prosecution of this case, though the trial court did not hear presentation of the motion. (*See Order Denying Motion to Reinstate*)

In response to the trial court's dismissal, a Motion to Reconsider Order Denying Motion to Reinstate, pursuant to Rule 60 of the West Virginia Rules of Civil Procedure, was filed on June 13, 2007, which provided that as a result of the cessation of Ms. Smith's attorney-client relationship with Mr. Anderson, activity in the case ceased. (*See Motion to Reconsider Order Denying Motion to Reinstate*). The motion further set forth in addition to Ms. Smith's new counsel posturing her case to be returned to the trial court's active docket, the undersigned was representing Ms. Smith in several personal injury cases, which have been actively pursued since the undersigned counsel had been retained. Specifically, Ms. Smith filed suit in the same circuit court, civil action no. 05-C-80, before Judge Moats, in regard to a personal injury matter, in which a settlement agreement was reached and the case was ultimately dismissed from Judge Moats' docket as a result thereof. Further, Ms. Smith was and is actively pursuing other personal injury actions in Marion County, West Virginia, case no. 05-C-272, and Monongalia County, West Virginia, case no. 06-C-657. The reason for specifically informing the trial court that Ms. Smith had other matters pending and was actively prosecuting them was to ensure that the trial court was not under the impression that

Ms. Smith was in the habit of filing suit and not pursuing her claims, given that the trial court called attention to the civil action which it had dismissed for failure to prosecute.

Further, in the Appellant's Motion to Reconsider Order Denying Motion to Reinstate, a hearing was specifically requested so that an oral presentation could be made to the trial court establishing good cause for the inactivity. (See Motion to Reconsider Order Denying Motion to Reinstate). The trial court by Order entered on July 11, 2007, denied the Appellant's motion, finding that all matters had been taken into consideration by previous Orders and that there was no need for a hearing on this matter. (See Order Denying Motion).

This Court stated in Dimon v. Mansy, "[b]ecause of the harshness of the sanction, a dismissal with prejudice should be considered appropriate only in flagrant cases." Dimon v. Mansy, 198 W.Va. 40, 45, 479 S.E.2d 339, 344 (1996). "Although courts should not set aside default judgment or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits." Howerton v. Tri-State Salvage, Inc., 210 W.Va. 233, 236, 557 S.E.2d 287, 290 (2001), citing Syl. Pt. 2, McDaniel v. Ramano, 155 W.Va. 875, 190 S.E.2d 8 (1970). "[D]ismissal based on procedural grounds is a severe sanction which runs counter to the general objective of disposing cases on the merit." Dimon v. Mansy, 198 W. Va. 45-4, 479 S.E.2d 344-345. Though the "determination whether the plaintiff has failed to move the case in a reasonable manner is a discretionary call for the circuit court." Id. at 198 W.Va. 45, 479 S.E.2d 344. This Court has acknowledged that its scope of review is limited to "only where there is a clear

showing of an abuse of discretion that reversal is proper.” Id. at 198 W.Va. 46, 479 S.E.2d 346. This Court in Covington v. Smith, held that “[d]espite the discretionary nature of such a determination, reinstatement is nevertheless proper where the moving party demonstrates the existence of good cause for such relief.” Covington v. Smith, 213 W.Va. 309, 316, 582 S.E.2d 756, 763 (2003).

Clearly, in this case the trial court abused its discretion when it failed to find that good cause existed for the period of inactivity or at least to set the matter of determining good cause for hearing. Under W.Va.R.Civ.P. 41(b), a plaintiff who seeks reinstatement has “the burden of going forward with the evidence and the burden of persuasion shall be the same as if the plaintiff has responded to the court’s initial notice.” Syl. Pt. 3, Dimon v. Mansy, 198 W.Va. 40, 479 S.E.2d 339. The Appellant has presented good cause why the action should not be dismissed, in that the period of inactivity resulted from her difficulties with her then attorney. Further, on October 29, 2004, Ms. Smith was involved in a motor vehicle accident, in which she sustained injuries including short-term memory loss, migraines, torn muscles in her rib cage, whiplash, neck and back pain, hip dysfunction, bruises, nerve damage to her face, and panic attacks for which she sought treatment for during the period of inactivity. As a result of the Appellant establishing good cause for the period of inactivity, the trial court should have shifted the burden to the defendant to show substantial prejudice.

The plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action; if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice to it in allowing the case to proceed; if the defendant does show

substantial prejudice, then the burden of production shifts to the plaintiff to establish that the proffered good cause outweighs the prejudice to the defendant. Id.

Given the fact that there were no hearings allowed by the trial court on Ms. Smith's Motion to Reinstate and Motion to Reconsider Order Denying Motion to Reinstate, the trial court could not and did not perform the burden shifting required in the analysis to reinstate the case to its active docket. The question of good cause is necessarily fact specific. This Court held in Covington, that "[t]o assess whether a plaintiff has demonstrated good cause in a particular case requires the reviewing court to conduct a factual inquiry." Covington v. Smith, 213 W.Va. 322, 582 S.E.2d 769. At the least the trial court should have held a hearing on Ms. Smith's motion for reinstatement. Further, no responses filed by the other parties to this matter which could allow the trial court to make a determination that they might be substantially prejudiced by allowing the case to proceed. Given that there were no responses filed demonstrating that the Appellees would be prejudiced by reinstatement, the trial court should have reinstated the matter given that the Appellant established good cause.

Assuming that the Appellees did provide a response to the Appellant's Motion to Reinstate and Motion to Reconsider Order Denying Motion to Reinstate, the only prejudice that they would be able to cite is that of time lapse. Certainly, this does not appear to be the case where individuals are no longer available to testify regarding the matters in question, given that only a short time period has passed which could not be cited to have effected the memories of any potential witnesses. The Appellees have not

and cannot show the court that they would be substantially prejudiced in allowing this case to proceed to a trial on the merits. Further, if the Appellees would be prejudiced by the reinstatement of this case that prejudice is not so great to outweigh the harm to Ms. Smith if the dismissal of her case would stand.

A court when weighing the evidence of good cause and substantial prejudice, should also consider “(1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant facts bearing on good cause and substantial prejudice.” Syl. Pt. 3, Dimon v. Mansy, 198 W.Va. 40, 479 S.E.2d 339. The trial court did not weigh the evidence in this case as it failed to have a hearing on the Appellant’s motions to reinstate. While it is clear from the record that approximately 1 year and 3 months passed from the last activity in the case and the date of the Dismissal Order, the actual time of dormancy is only slightly over one year, and the Appellant has provided good cause for that period of inactivity. Further, even after the Appellant’s counsel moved to withdraw and that motion was denied, the Appellant authorized Mr. Anderson to continue his representation of her as she did not feel the concerns raised in his Motion to Withdraw would prejudice her. The Appellant had contacted Mr. Anderson several times during the approximately 1 year and 3 months to ensure that the Mr. Anderson was still representing her in regard to this case. The Appellant was never notified by Mr. Anderson that he would not continue to represent her after his motion to withdraw as counsel had been denied. Lastly, the Appellant was

injured in a car accident which occurred on October 29, 2004, in Monongalia County, West Virginia, where she sustained many injuries including short-term memory loss, migraines, torn muscles in her rib cage, whiplash, neck and back pain, hip dysfunction, bruises, nerve damage to her face, and panic attacks. During the time of dormancy, Ms. Smith sought and obtained medical treatment for her injuries. To date, Ms. Smith is still suffering from the effects of the short-term memory loss she sustained in the accident and continues treatment with healthcare professionals.

This Court in Covington cited Winona Nat'l Bank v. Fridley, in that "[o]ur jurisprudence has long 'held that . . . good cause can only appear by showing . . . some . . . circumstance beyond the control of the party, and free from neglect on his part.'" Covington v. Smith, 213 W.Va. 322, 582 S.E.2d 769, citing Winona Nat'l Bank v. Fridley, 122 W.Va. 479, 481, 10 S.E.2d 907, 908 (1940). "Establishing good cause puts the burden on the party seeking relief to show some *plainly adequate* reason therefor[,] not merely *any reason*." *Id.* citing AT&T Communications of West Virginia, Inc. v. Public Serv. Comm'n of West Virginia, 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992). Certainly, the Appellant believed that her attorney was working on the case during the period of inactivity and the inactivity resulted from the cessation of her attorney-client relationship which she was unaware of and did not consent to. This is a matter of the Appellant's former attorney failing to litigate on her behalf, while failing to inform the Appellant that it was his intention not to move forward with her case after his motion to withdraw was denied. The Appellant's former counsel failed to inform her of the

potential loss of her right to pursue the case and the possibility of dismissal which could occur as a result of his inactivity. These facts coupled with Ms. Smith's then recently sustained injuries provide a plain and adequate reason for reinstatement.

As a result, the Appellant's Motion to Reconsider Order Denying Motion to Reinstatement should have been granted by the trial court. Rule 60(b) of the West Virginia Rules of Civil Procedure provides, in pertinent part, as follows:

Rule 60. Relief from judgment order. . .

(b) Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; . . . or (6) any other reason justifying relief from the operation of the judgment.

W. Va. R. C. P. 60(b).

"A court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), should recognize that the rule is to be liberally construed for the purpose of accomplishing justice" and "designed to facilitate the desirable legal objective that cases are to be decided on the merits." Toler v. Shelton, 157 W.Va. 778, 784-785, 204 S.E.2d 85 (1974). "A motion to vacate a judgment made pursuant to Rule 60(b), W.Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Id. This Court has provided that "[a]n appeal of the denial of a Rule 60(b) motion, however brings to consideration for review only the order of denial itself and

not the substance supporting the underlying judgment nor the final judgment orders.”

Id. Further, “the function of the appellate court is limited to deciding whether the judge abused his discretion in ruling that sufficient grounds for disturbing the Finality of the judgment were not shown in a timely manner.” Id.

Ms. Smith has met her burden of demonstrating good cause for the period of inactivity and has set for reason justifying relief from the dismissal of her Counterclaim by the trial court. Therefore, the trial court abused its discretion when it failed conduct a hearing with regard to Ms. Smith’s motions and when it failed to find that sufficient grounds existed to reinstate Ms. Smith’s cause of action.

V.

CONCLUSION

The period of inactivity which occurred in this case was outside of the control of the Appellant and the Appellant has established good cause for the period of inactivity which resulted in this case being dismissed by the Circuit Court of Taylor County, and as a result the Appellant’s Motion to Reinstate and Motion to Reconsider Order Denying Motion to Reinstate should have been granted by the Circuit Court of Taylor County and the matter reinstated on the court’s docket.

VI.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing errors, the Appellant, Christal M.

Dempsey, a.k.a Christal M. Smith, by counsel, respectfully prays that this Honorable Court reverse the February 17, 2006, March 21, 2007, and July 11, 2007, Orders of the Circuit Court of Taylor County, West Virginia, and requests that this matter be remanded to the Circuit Court of Taylor County for reinstatement of this civil action and adjudication of the claim upon its merits.

RESPECTFULLY SUBMITTED,
CHRISTAL M. DEMPSEY, A.K.A
CHRISTAL M. SMITH
Appellant, BY COUNSEL



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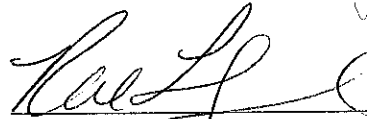
CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true copy of the within **APPELLANT'S BRIEF** by placing a true copy of the same in the United States Mail, postage prepaid, on the 16th of July, 2008, upon the following:

LaVerne Sweeney, Esq.
215 West Main Street
Grafton, WV 26354
Counsel for the Plaintiff

Edward Charlton
Charlton Construction
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